No. 76-1382

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN ARTHUR SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR JOHN ARTHUR SCOTT

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in this cause is reported at 544 F.2d 903.

JURISDICTION

The Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Should the Government be permitted to subject the respondent to another trial on one count of a three count indictment when that count was dismissed by the court at the conclusion of presentation of all of the evidence at trial and the jury found the defendant not guilty of another count charged in the same indictment?

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

The respondent accepts the statement of the petitioner as to the relevant laws and rule.

STATEMENT OF CASE

On January 22, 1975, John Arthur Scott was arrested on two complaints authorized by the United States Attorney charging him with distribution of codeine on September 24, 1974, and heroin

on January 22, 1975. A preliminary examination was conducted on February 18, 1975, as to both charges. On March 5, 1975, the grand jury returned an indictment with counts covering the charges contained in the complaints. In addition, another charge was added referred to as Count I. That count alleged distribution of cocaine on September 20, 1974. Count I is the subject of the petition herein.

On April 8, 1975, respondent filed a timely motion to dismiss Counts I and II, the September 20 and 24 allegations, due to pre-indictment delay. Counsel for the respective parties submitted briefs on the motion and oral argument was presented. The court denied the petition without prejudicing the respondent from renewing the motion after evidence was presented at trial.

The government's case as to Count I consisted of the testimony of a paid informant that he had received cocaine from the respondent while the two were alone in his residence on September 20, 1974.

Mr. Scott testified that he was an undercover officer for the Central Narcotics Unit of Muskegon County, Michigan. He indicated that he knew the informant because he had conducted an investigation which had culminated in the informant's arrest on a charge of possession of heroin in May, 1974.

The respondent testified in detail regarding the allegations of January 22, 1975. His testimony was corroborated by several other witnesses who confirmed that the informant had been boasting about the fact that he had "set up" Officer Scott.

As to the September 24, 1974 incident, the respondent was the only witness on his behalf. He related the facts surrounding that allegation with less specificity than the January 22 incident.

As for the allegations in Count I, again, Officer Scott was the only witness on his own behalf. However, unlike the other counts, he was unable to recall any of his activities on September 20, 1974. He did deny ever delivering drugs to the paid informant. At the conclusion of the presentation of the government's case, the respondent renewed the motion for dismissal based on pre-indictment delay. The court, again, denied the motion without prejudice to renew it at the conclusion of all of the proofs.

Consequently, after Officer Scott testified he had no recollection of the September 20, 1974, events and all of the evidence from both sides was presented, the motion to dismiss was renewed. After hearing all of the evidence presented to the jury, the judge ruled on the motion and dismissed Counts I and II. The jury thereafter acquitted the respondent as to Count III.

After receiving an extension of time for filing notice of claim of appeal, the government appealed the court's decision regarding Counts I and II. The Sixth Circuit Court of Appeals dismissed the appeal and affirmed the judgment of the district court. A petition for rehearing was denied.

REASONS FOR DENYING PETITION

The apparent basis for the petition by the government that review would be appropriate in this case is that it is the precise issue reserved by the court in Serfass v United States, 420 U.S. 377, 394. (Br. 6). In addition, the petitioner claims that the court has not adequately considered this issue in the only other decision involving remotely similar facts, United States v Wilson, 420 U.S. 322. Finally, the government contends that the circumstances of United States v Martin-Linen Supply Co., No. 76-120, decided April 4, 1977 are so dissimilar that the court's opinion in that case is not applicable. (Br. 6).

Without extensive elaboration on the lack of merit in the government's petition, the respondent submits that the aforesaid reasons for review are invalid. The petitioner's interpretation of the applicability of Wilson is essentially correct. The case is clearly distinguishable because of one significant point. In Wilson, the dismissal of the charge by the court occurred after the jury had

returned a guilty verdict. A reversal of the trial judge's ruling on appeal would not have subjected the defendant to another trial since the jury verdict would have prevailed. In the instant case, any reversal of the judgment of the trial court would necessarily require a second trial.

The respondent submits that the opinion in Wilson permitting appeal hinged upon this significant distinction in facts. The court was mindful that the thrust of the Double Jeopardy Clause was to block a second trial with all of the attendant anxiety and expense which befalls the defendant. The opinion concluded that appellate review was appropriate in Wilson because it would not raise the possibility of these undesirable consequences to the defendant nor would it afford the government any tactical advantages in its prosecution. But for the fact the second trial was not necessary, the Wilson court would have denied appellate jurisdiction. This conclusion is implicit in the court's reasoning underlying its decision. Id.at 352.

Applying the implications of Wilson to the instant case, it is clear that appellate review is inappropriate. Should a reviewing court determine to set aside the trial judge's ruling, the respondent would be forced to stand trial once again on Count I. This is precisely the result that the Double Jeopardy Clause shields against since Officer Scott has already faced the expense and anxiety of a

trial on Count I. All evidence was presented by both sides in the first trial of this case, and a retrial would provide the government with an opportunity to re-examine the weaknesses in its first presentation. This is condemned by Wilson. Id.

As for the contention that Serfass reserved the issue at bar in this case, respondent submits the government has seriously misinterpreted the opinion therein. The issue not decided in Serfass was whether government appeal is permitted where a defendant is afforded the chance to have a pretrial ruling of a legal defense and deliberately defers raising the issue until after he has been placed in jeopardy. 420 at 394. That hypothetical is inapposite to the facts herein. The respondent filed a timely motion to dismiss Count I for pre-indictment delay several months prior to trial. There was no deliberate effort to defer the issue until after jeopardy attached. The motion afforded the government and the judge ample opportunity to resolve the issue prior to commencement of trial. Furthermore, the respondent renewed the motion before he introduced any proofs, and the court denied the motion again without prejudice to renew at the conclusion of all proofs. It is difficult to imagine what respondent could have done to more diligently and appropriately pursue the issue. The problem was raised at every opportunity and does not involve the deliberate delay situation reserved in Serfass.

The respondent submits that the court has given the bench and bar adequate guidelines to dispose of the questions herein through its recent decision in United States v Martin-Linen Supply, No. 76-120, decided April 4, 1977. The petitioner erroneously seeks to distinguish Martin-Linen by noting that it involved an "acquittal". (Br. 6, n.2). Assuming, arguendo that this case did not involve an acquittal and Martin-Linen did, that is not a distinction of any consequence. This court has ruled that the particular nomenclature attached to the action taken by the lower court has no relevance to deciding the applicability of the Double Jeopardy Clause. United States v Sisson, 399 U.S. 267. Rather, a reviewing court must examine the basis for the decision in the lower court in order to determine whether the action was, in fact, an acquittal which would bar further prosecution. The test developed by Sisson is that the trial court's action must not be based on any matters not apparent on the face of the indictment itself. Id. In order to avoid application of the Double Jeopardy Clause, the issue raised by the defense must be capable of determination without trial of the general issue and litigating the facts surrounding the commission of the alleged offense must be of no assistance in determining the validity of the defense. United States v Covington, 395 U.S. 57.

The facts in the instant case should be analyzed with Sisson in mind. It is clear that the trial judge wanted to hear the

evidence in the case to assist in deciding whether to dismiss or acquit the respondent. The order denying the pretrial order indicated,

> "the defendant may reassert it if he chooses after all evidence has been presented." (App. A, infra).

In fact, the court considered evidence presented by both sides at trial concerning the nature of Officer Scott's work, the circumstances surrounding his assignment to the narcotics squad, the demeanor of the witnesses testifying, the impairment of recall of events by both the respondent and the informant and based his decision "solely out of the peculiar circumstances of this case". (App. B, infra). This type of analysis by the trial court had all of the incidences of an acquittal. Thus, Martin-Linen principles would apply in this case.

Petitioner's brief refers to several factors which are considered by appellate courts in evaluating the applicability of the Double Jeopardy Clause. These considerations, in the instant case, are decisively resolved in favor of shielding Officer Scott from a second trial. (Br. 8) The motion was diligently presented before trial. The court's decision was obviously based upon evidence presented at trial. The cases cited in the government's brief indicate that the factual situation herein prohibits a retrial of the respondent.

The petitioner seeks to have this court reverse its previous position as to the purpose of the Double Jeopardy clause which is,

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense . . . The underlying idea, one that is deeply ingrained in at least, the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." Green v United States, 355 U.S. 184, 187-88 (1957).

The government argues that the court should abandon its position in Green and adopt the viewpoint that the primary purpose of the Double Jeopardy clause is to secure to a defendant the right to have a verdict from a particular factfinder. (Br. 8). This is contrary to the above-cited quotation from Green. Moreover, whatever validity this argument may have as it relates to a mistrial situation, such is not the case here. The ruling of the judge in this cause was not based upon misconduct or error arising during the course of the trial. The fatal error in this case actually occurred long before commencement of the trial with the unreasonable delay before indictment. In that sense, the issue of obtaining a verdict from a particular factfinder is not relevant. There

was no error at trial which so contaminated the particular jury involved as to require a mistrial. The facts which led to dismissal in this case were legitimately presented to the jury. If there were a retrial, the same facts could be properly injected into the case before a different petit jury. Thus, the premise of the government's contention as to the purpose of the Double Jeopardy Clause is not relevant to the circumstances of this case.

Petitioner requests this court to change its position in Green and hinge the applicability of double jeopardy on one factor stated in the government's brief in support of its petition in Lee v United States, No. 76-5187: whether the accused surrendered his right to receive the empaneled jury's verdict by request or agreement. (Br. 8). This proposition initially fails because, as noted in the previous paragraph, it misinterprets the rights protected by the Double Jeopardy Clause as stated in Green. Moreover, the facts in Lee are significantly different from the instant case. Lee actually addresses itself to the question reserved in Serfass -- the effect of the accused's deliberate delay in raising a legal defense until after jeopardy has attached. In Lee, the defendant elected not to raise the motion for dismissal based on a defective indictment until after the trial had commenced and was chided by the trial court for that tactic. (Lee, Br. 2). Certainly the government's contention that the accused should not complain of double jeopardy is

more attractive where he has deliberately deferred a motion more appropriately raised before trial. The defendant in Lee was able to control his own destiny. That type of legal defense, a defective charge, can be considered by looking at the face of the indictment alone. Under those circumstances, the opinion in Sisson would suggest that a retrial would not be barred since it was not necessary to go beyond the face of the pleadings to rule on the motion. The issue could have been raised and decided at any time, and the accused's tactics in Lee are vulnerable to criticism.

However, in the instant case, the respondent proceeded with diligence in pursuing his defense of unreasonable pre-indictment delay. The accused presented a motion for dismissal based on this defense prior to trial and requested a hearing thereon. In Lee, the government acknowledged there would have been merit to the accused's claim of double jeopardy if he had filed a pretrial motion. (Lee, Br. 32). Pursuant to respondent's request herein, a pretrial hearing was held and the motion was denied, but the court did not prejudice his right to renew the motion after all evidence was presented. Officer Scott did not ask that the ruling on his motion wait until after jeopardy had attached by completing presentation of evidence to the bench and jury. He asked the judge to rule before trial. The court refused the request. At that point, the respondent relinquished control over his destiny to the court.

Thus, the government cannot seriously contend that the accused elected to have a ruling at the time the court chose to dismiss Count I. The respondent was actually forced to undergo the trial before his motion would be ruled upon. The only alternative to renewing the motion after all evidence was presented would have been to abandon this constitutional due process defense entirely. Certainly, the government would not suggest that the accused should have been required to elect to forfeit his constitutional right to due process of law.

In fact, the government's suggestion in its brief that respondent elected the course of action followed by the trial judge is somewhat inconsistent with its position in United States v Lovasco, No. 75-1844. In its brief supporting its petition in Lovasco, the government admits that a motion for pre-indictment delay cannot properly be heard until all evidence has been presented at trial due to the peculiar nature of that legal defense. (Lovasco, Br. 40). This position, that the motion cannot be heard until after proofs are concluded, directly refutes the notion that the respondent chose to defer ruling on his motion until that point. If the government relies on Lovasco in support of its petition herein, it has, thereby, distinguished the case from Lee which did involve facts affording the accused an option in timing his motion. The petitioner cannot rely on

Lavasco and look to Lee for support with any semblance of logic or consistency.

The government suggests that the respondent forfeited the protection of the Double Jeopardy Clause by not deferring ruling on the motion until after a verdict had been rendered. Initially, this proposition assumes that the onus is on the accused to orchestrate the case in such a fashion as to preserve the government's privilege to appeal. The petitioner cites no authority for that assumption and, indeed, there is none. The government was represented at the pretrial hearing and the trial. Thus, the United States attorney had opportunities equal to those of the respondent to request that the judge defer his ruling on the motion until after a verdict. Certainly the accused does not bear the burden of safeguarding the government's interests as well as preserving his own rights. If any party had the responsibility to avoid the application of the Double Jeopardy Clause, this obligation clearly rested with the government.

The other aspect of the government's position that is not realistic is the notion that either party had the option to defer ruling on the motion until after the verdict. This is a prerogative which is reserved to the trial court. F.R.C.P. 12. Neither party can control that aspect of the case. One can only request. This was done by the accused when he presented the motion for a

ruling before commencement of trial. The court made it abundantly clear to both parties that any renewal of the motion was to be made "after all evidence has been presented". (App. A. infra). When the respondent attempted to renew the motion at the conclusion of the prosecution's case, the judge, again, denied the motion while reserving the accused's right to renew it after all evidence was presented. The order did not say the motion could be presented after a verdict, but rather after all evidence was presented. (App. A, infra). The accused acted with diligence in presenting his motion as early as possible and at every possible opportunity thereafter. Surely, he should not run the risk of denial of the motion for lack of timeliness by delaying until the last moment. It is, indeed, ironic that the government should contend that the accused's failure to bring a motion before trial in Lee should warrant a second trial and, at the same time, argue that the respondent should be stripped of the protection of the Double Jeopardy Clause when he made his motion before trial.

CONCLUSION

The petition for writ of certiorari is without merit and should be denied.

Respectfully submitted,

William C. Marietti

June 15, 1977

Alexis J. Rogeski

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
NOV 20 1975
Gerald H. Lieter, Clerk
WD South

UNITED STATES OF AMERICA,

Plaintiff,

v. G75-54 Cr.

JOHN ARTHUR SCOTT,

Defendant.

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ORDER

A hearing having been held on the motions to dismiss Counts I and II, and to sever all counts to be tried, IT IS HEREBY ORDERED that:

1. The motion for severance is denied, and
2. The motion to dismiss is denied without prejudice, so that the defendant may reassert it if he chooses after all evidence has been presented.

Dated: November 20, 1975.

NOEL P. FOX
Chief Judge, United States District Court

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COURT'S OPINION FROM THE BENCH

THE COURT: The Defendant has renewed his motion to dismiss Counts I and II based on the delay between the date the offenses are alleged to have occurred and the time he was charged.

I hereby grant the motion to dismiss with respect to Count I.

The Defendant testified with a good deal of specificity as to the occurrence on September 24, 1974, that is, the alleged offense in Count II.

In the Count with respect to Count I involving an alleged offense of September 20, 1974, the Defendant was able to give only a general denial. He could not recall the specifics of what happened on that date. I find the prejudice shown with respect to Count I caused by the preindictment delay was sufficient to result in the dismissal of that Count.

I note that the Defendant's testimony was given before the jury considering his guilt or innocence and not simply presented in separate hearing before me.

In addition, it is not insignificant that Bobby Jordan also had some difficulty remembering the details of the September events, even though he had the benefit of written statements.

Furthermore, the difference in the Defendant's ability to recall events of September 20th and events of September 24th is not without reason. When the Defendant was arrested on January 22, 1975, a Complaint charged him with the offense alleged that occurred -- alleged to have occurred on January 22, 1975 and September 24, 1974. The indictment returned by the Grand Jury on the 5th of March, 1975, added the September 20th offense. This additional delay can explain the differences in the Defendant's ability to recall.

The Government is correct in stating that the issue of preindictment delay is one of balancing of interests. However, as stated above, in this case a balance of those interests results in the dismissal of Count I.

The problem is to determine how much, if any, prejudice need be shown, based on the Government's reason for the delay. The quantum of prejudice which need be shown will vary with the circumstances. U.S. versus Marion, cited in 404 U.S. Supreme Court 307, 1971. For delay which is completely unintentional a defendant will have to show at least substantial actual prejudice.

On the other hand, if the delay is caused by the Government, intending to prejudice the Defendant's opportunity to present a defense, only a minimal amount of prejudice, if any, may be required. In between these two

extremes will be a variety of instances of intentional but legitimate delay. See, for example, United States versus King, 521 Fed. 2d 356, 6th Circuit case. Each case must be considered on the basis of the totality of the circumstances peculiar to it. U.S. versus Marion, supra.

Here the reason for the delay was principally to gain tactical advantage over this Defendant -- to gather more evidence of alleged offenses by him. Obviously the more charges which can be brought against one defendant in one proceeding the more likely the jury will not believe an innocent explanation of a single count or a single charge. Prejudice to the Defendant's ability to present his defense was not intended, but such was the result of Count I.

I want to repeat and emphasize the delay here was the result of the Government's intentional choice, with the principal motive being to gather evidence of further crimes, further alleged crimes by the Defendant in order to gain a tactical advantage at the trial. In such a situation the Defendant may show a lesser degree of prejudice to justify dismissal than where the reason for delay is neutral as respects the particular defendant charged.

I do not decide whether the degree of prejudice shown here would be sufficient for dismissal if the reason for delay was neutral. I hold only that since the delay resulted primarily from an attempt to gain a tactical

advantage, this Defendant has presented sufficient proof of prejudice with respect to Count I.

However, evidence of the charge involved in Count I is admissible to the same extent as evidence of any other alleged criminal action by the Defendant. See U.S. versus Jones, the Federal Rules of Evidence for the United States in the United States Courts 405.

The Defendant's denial of ever having distributed narcotics tempers the delay-induced prejudice sufficiently to allow evidence to be received as relevant to the other charges.

I am still a little concerned about September 24th because of some of the totalities of the circumstances in this case. Here is a black officer, the only black officer ever to serve in the unit. He was denied help when again and again he asked for help. That is a jungle out there. The Defendant's theory is that he was left alone, and being left alone he had to devise his own means of surviving in that jungle, and that he was in the process of trying to eliminate what he contended was a big operator, the Government's informant Jordan.

There is evidence in the record from which the jury can conclude that the Defendant's evidence was correct.

One of the problems is, in this case, as I see it, is the very heavy burden which the Defendant had to

carry when he was in that jungle. And what -- here was an officer. He was brought up from the patrol and tossed into the thicket of a highly sophisticated area of activities. And of all of the things he had to try to remember in that kind of a circumstance he may have forgotten crucial testimony essential to his defense.

I am going to dismiss Count II, as well.

I am not setting a precedent in that regard. I am doing it solely out of the peculiar circumstances of this case. The Defendant in this case should not have been out there in that jungle alone. And what I am concerned about is a compromise verdict which may result if he were to be -- had to stand trial all the way on the three counts.

And it is so ordered.

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REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a true and accurate transcript of the proceedings in the aforementioned case.

James L. Reinardy
Court Reporter

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